Dr Thomas Samuel v Pertubuhan Keselamatan Sosial (PERKESO) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-681–11 OF 2021
SUPANG LIAN, GUNALAN MUNIANDY AND AZIZUL AZMI ADNAN JJCA
6 NOVEMBER 2023

Civil Procedure — Judicial review — Application for — Appeal against High Court's decision in dismissing judicial review application — First respondent's decision to transfer applicant was not interfered by second respondent — Whether mode of proceedings was correct — Whether first respondent had acted lawfully and properly in accordance with terms of contract of employment — Whether respondents had acted in bad faith and/or ultra vires

This was an appeal by the appellant against the decision of the learned judge of the High Court ('LJ') in dismissing the appellant's judicial review application. By a letter of offer of employment, the first respondent ('R1') offered the appellant a position as 'Pegawai Perubatan Gred 27' in the organisation ('PERKESO') and the appellant accepted the offer. The appellant's confirmation was effective from 2 February 2013. On 19 January 2018, the transfer of the appellant to Pusat Rehabilitasi PERKESO Tun Abdul Razak in Melaka by R1 was not interfered with by the second respondent ('R2'). The appellant filed an application for judicial review ('JR') to seek, inter alia, the following reliefs: (a) an order of certiorari to quash the decision of R1 in transferring the applicant to PERKESO Tun Abdul Razak Rehabilitation Centre in Melaka; (b) an order of certiorari to quash the decision of R2 in refusing to transfer the applicant from PERKESO Tun Abdul Razak Rehabilitation Centre in Melaka back to his original place of employment at PERKESO Head Office in Kuala Lumpur; and (b) an order of mandamus to compel R1 to transfer the applicant back to R1's head office in Kuala Lumpur. The respondents raised preliminary objection ('PO') as to the correct mode of proceedings. The LJ accepted the respondents' objection that the applicant ought to have come to court by way of writ or originating summons, rather than judicial review, as R2 was not a public body and the dispute was strictly a private employment law dispute rather than a public law dispute. In dismissing the appellant's JR, the LJ was of the considered view that the JR was unsustainable as this case was purely a contractual and employment matter and was not suitable for judicial review. Even if the appellant's JR was considered on its merits, the same was bound to fail as the appellant's transfer by R1 was done in compliance with the terms and conditions of the letter of offer of employment. Therefore, the decision of the respondents was not tainted with

any errors of law, irrationality and/or unreasonableness that warranted the intervention of the High Court. Hence, this appeal. A

Held, allowing the appeal with costs:

(1) The LJ had misdirected himself on the law in regard to the PO when he failed to direct his mind to the relevant question that should be asked in a JR application pursuant to O 53 r 2(4) of the Rules of Court 2012. The respondents were public bodies exercising statutory functions in the exercise of which R1 had made a decision or taken an action with which the applicant, who was also performing public duties under the Employees Social Security Act 1969 ('the Act') was aggrieved. Hence, the decision of the LJ in sustaining the respondents' PO was set aside (see para 29). B C

(2) The LJ was misconceived in concluding that there was nothing improper, illegal and/or ultra vires about R1's decision to transfer the applicant, R2's decision not to interfere with the same, and the process which had led to the said outcome. The LJ had not properly considered the applicant's assertion that while PERKESO which employed him was a public body, being an authority established and governed by law the Melaka Centre was an entity that was legally separate from PERKESO and not established under the Act. Under the circumstances, based on a proper construction of the letter of employment, the transfer was not in accordance with the explicit terms of the clause that PERKESO was only authorised to transfer its employees, including the applicant to any of its offices. Therefore, for R1 to transfer him, a public servant who had chosen employment with a statutory body, to continue his service with an institution owned by a private limited company was ultra vires the Act and contrary to the terms of the employment contract. The LJ had erred in failing to properly construe and interpret the clear terms of the contract to the detriment of the appellant and arriving at a wrong conclusion that the transfer decision did not suffer from illegality. R1 was not authorised to transfer the applicant to a private entity not set up under the Act as it was not vested with the power to issue the transfer which was contrary to the interests of R1 as a public body (see paras 43–44, 50–51 & 54). D E F G H

(3) There was non-direction on the LJ's part when he failed to consider that R2 had abdicated its decision-making responsibility by shifting it to the management of R1 through its letter to decide on the validity of the transfer. Importantly, the LJ had failed to bear in mind that R2's action was contrary to s 59N(2) of the Act since the decision appealed against was made by R1 itself. R2 had a statutory obligation and duty to decide the appeal on its merits and not summarily defer to the decision of R1 without further deliberation. Hence, the respondents' proposition that I

A R2's decision or action was not amenable to JR for not being a public authority or body was obviously baseless and flawed (see paras 56–57).

[Bahasa Malaysia summary

B Ini adalah rayuan oleh perayu terhadap keputusan hakim Mahkamah Tinggi ('HMT') yang bijaksana dalam menolak permohonan semakan kehakiman perayu. Melalui surat tawaran pekerjaan, responden pertama ('R1') menawarkan kepada perayu jawatan sebagai 'Pegawai Perubatan Gred 27' dalam organisasi ('PERKESO') dan perayu menerima tawaran tersebut. Pengesahan perayu berkuat kuasa mulai 2 Februari 2013. Pada 19 Januari C 2018, pemindahan perayu ke Pusat Rehabilitasi PERKESO Tun Abdul Razak di Melaka oleh R1 tidak diganggu oleh responden kedua ('R2'). Perayu memfailkan permohonan untuk semakan kehakiman ('JR') untuk mendapatkan, antara lain, relif berikut: (a) perintah certiorari untuk membatalkan keputusan R1 dalam memindahkan pemohon ke Pusat D Pemulihan PERKESO Tun Abdul Razak di Melaka; (b) perintah certiorari untuk membatalkan keputusan R2 yang enggan memindahkan pemohon dari Pusat Pemulihan PERKESO Tun Abdul Razak di Melaka kembali ke tempat kerja asalnya di Ibu Pejabat PERKESO di Kuala Lumpur; dan (c) perintah E mandamus untuk memaksa R1 memindahkan pemohon kembali ke ibu pejabat R1 di Kuala Lumpur. Responden membangkitkan bantahan awal ('PO') tentang cara prosiding yang betul. HMT menerima bantahan responden bahawa pemohon sepatutnya datang ke mahkamah melalui writ atau saman pemula, bukannya semakan kehakiman, kerana R2 bukan badan F awam dan pertikaian itu adalah pertikaian undang-undang pekerjaan swasta dan bukannya pertikaian undang-undang awam. Dalam menolak JR perayu, HMT berpendapat bahawa JR adalah tidak dapat dipertahankan kerana kes ini adalah semata-mata urusan kontrak dan pekerjaan dan tidak sesuai untuk semakan kehakiman. Jika pun JR perayu telah dipertimbangkan atas meritnya, G perkara yang sama pasti gagal kerana pemindahan perayu oleh R1 telah dilakukan dengan mematuhi terma dan syarat surat tawaran pekerjaan. Oleh itu, keputusan responden tidak dicemari dengan sebarang kesilapan undang-undang, tidak rasional dan/atau tidak munasabah yang memerlukan campur tangan Mahkamah Tinggi. Oleh itu, rayuan ini.

H **Diputuskan,** membenarkan rayuan dengan kos:

(1) HMT telah tersilap mengarahkan dirinya terhadap undang-undang berkenaan dengan PO apabila beliau gagal mengarahkan fikirannya kepada soalan berkaitan yang harus ditanya dalam permohonan JR I menurut A 53 k 2(4) Kaedah-Kaedah Mahkamah 2012. Responden adalah badan awam yang menjalankan fungsi berkanun yang mana R1 telah membuat keputusan atau mengambil tindakan yang mana pemohon, yang juga menjalankan tugas awam di bawah Akta Keselamatan Sosial Pekerja 1969 ('Akta') telah terkilan. Oleh itu,

keputusan HMT dalam mengekalkan PO responden telah diketepikan (lihat perenggan 29).

(2) HMT tersilap dalam membuat kesimpulan bahawa tiada yang tidak wajar, menyalahi undang-undang dan/atau ultra vires tentang keputusan R1 untuk memindahkan pemohon, keputusan R2 untuk tidak campur tangan dengan perkara yang sama, dan proses yang membawa kepada keputusan tersebut. HMT tidak mempertimbangkan dengan betul dakwaan pemohon bahawa walaupun PERKESO yang menggajinya adalah sebuah badan awam, sebagai pihak berkuasa yang ditubuhkan dan dikawal oleh undang-undang, Pusat Melaka adalah entiti yang berasingan secara sah daripada PERKESO dan tidak ditubuhkan di bawah Akta. Dalam keadaan itu, berdasarkan pembinaan surat pekerjaan yang betul, pemindahan itu tidak mengikut terma eksplisit klausa bahawa PERKESO hanya diberi kuasa untuk memindahkan pekerjanya, termasuk pemohon ke mana-mana pejabatnya. Oleh itu, bagi R1 memindahkannya, seorang penjawat awam yang telah memilih pekerjaan dengan badan berkanun, untuk meneruskan perkhidmatannya dengan institusi milik syarikat sendirian berhad adalah ultra vires Akta dan bertentangan dengan terma kontrak pekerjaan. HMT telah terkhilaf kerana gagal mentafsir dan menterjemahkan dengan betul terma kontrak yang jelas sehingga menjejaskan perayu dan membuat kesimpulan yang salah bahawa keputusan pemindahan itu tidak menyalahi undang-undang. R1 tidak diberi kuasa untuk memindahkan pemohon kepada entiti swasta yang tidak ditubuhkan di bawah Akta kerana ia tidak diberi kuasa untuk mengeluarkan pemindahan yang bertentangan dengan kepentingan R1 sebagai badan awam (lihat perenggan 43–44, 50–51 & 54).

(3) Tiada arahan di pihak HMT apabila beliau gagal mempertimbangkan bahawa R2 telah melepaskan tanggungjawab membuat keputusannya dengan mengalihkannya kepada pengurusan R1 melalui suratnya untuk memutuskan kesahihan pemindahan itu. Yang penting, HMT telah gagal untuk mengingati bahawa tindakan R2 adalah bertentangan dengan s 59N(2) Akta memandangkan keputusan yang dirayu itu dibuat oleh R1 sendiri. R2 mempunyai kewajipan dan kewajipan berkanun untuk memutuskan rayuan atas meritnya dan tidak mengikut keputusan R1 secara ringkas tanpa pertimbangan lanjut. Oleh itu, cadangan responden bahawa keputusan atau tindakan R2 tidak boleh dicabar oleh JR kerana bukan pihak berkuasa atau badan awam adalah jelas tidak berasas dan cacat (lihat perenggan 56–57).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (distd)

Commissioner of the Independent Commission of Investigations v Police Federation

A *and others (Jamaica); Lewin (Director of Complaints of the Independent Commission of Investigations) v Diah (Jamaica)* [2020] UKPC 11, PC (folld)
Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors [2007] 2 MLJ 761; [2007] 1 MLRH 1; [2006] 8 CLJ 114, HC (folld)
Lembaga Jurutera Malaysia v Leong Pui Kun [2009] 2 MLJ 36, FC (refd)
B *R v Richmond London BC, ex p Watson* [2001] QB 370, CA (folld)

Legislation referred to

Companies Act 2016
Employees Social Security Act 1969 ss 59A, 59B(1), (2), (3), 59H, 59J,
C 59M, 59N(2), 72(a)
Penal Code
Public Authority Protection Act 1948
Rules of Court 2012 O 53, O 53 r 2(4)

D **Appeal from:** *Dr Thomas Samuel v Pertubuhan Keselamatan Sosial (PERKESO) & Anor* [2022] MLJU 2308 (High Court, Kuala Lumpur)

Shanmuga Kanesaligam (with Khaizan Sharizad bt Ab Razak) (Seira & Sharizad) for the appellant.
E *Ratha Govindasamy (with Diba Natalia Ishak) (Skrine) for the respondents.*

Gunalan Muniandy JCA:

INTRODUCTION

F

[1] The appellant's appeal is against the decision of the learned judge of the High Court ('LJ') dated 12 November 2021 dismissing the appellant's judicial review application.

G BACKGROUND FACTS

[2] By a letter of offer of employment dated 20 January 2012, the first respondent offered the appellant a position as 'Pegawai Perubatan Gred 27' in the organisation ('PERKESO').

H

[3] By a letter of acceptance dated 30 January 2012, the appellant accepted the said offer. Effective 2 February 2012, the appellant held the position as a 'Pegawai Perubatan Gred 27'.

I **[4]** By letter dated 30 September 2014, the first respondent wrote to the appellant to confirm his position as a 'Pegawai Perubatan Gred 27'. The appellant's confirmation was backdated to be effective from 2 February 2013.

[5] By letter dated 11 January 2017, the appellant wrote to the first

respondent to apply for study leave (without pay) from 20 February 2017–July 2019 to pursue a Masters of Social Sciences degree at Waikato University Hamilton, New Zealand.

[6] By a memorandum ('memo') dated 13 February 2017, the first respondent informed the appellant that his application for study leave (without pay) from 20 February 2017–31 July 2019 was not approved.

[7] By letter dated 14 March 2017, the appellant wrote to appeal to the first respondent against the non-approval of his application for study leave (without pay). The appellant informed the first respondent that he had obtained a deferment of the said course which would then begin from 3 July 2017–31 December 2019.

[8] By a memo dated 22 March 2017, the first respondent informed the appellant that it was unable to consider the appellant's appeal.

[9] By a further letter dated 14 September 2017, the appellant wrote to the first respondent to reconsider his appeal against the non-approval of his application for study leave (without pay). The appellant informed the first respondent that he had obtained a further deferment of the said course to begin from 19 February 2018–31 August 2020.

[10] By a memo dated 23 October 2017, the first respondent wrote to the appellant to inform him that his application for study leave (without pay) to pursue a Masters of Social Sciences at the Waikato University, Hamilton, New Zealand from 19 February 2018–31 August 2020 was not approved on the basis of 'kepentingan perkhidmatan'.

[11] By a letter dated 9 January 2018, the appellant then wrote to the then Minister of Human Resources to appeal against the first respondent's decision to not approve his application for study leave (without pay). The appellant did not receive any reply from the then Minister of Human Resources.

[12] On 19 January 2018, the transfer of the appellant to Pusat Rehabilitasi PERKESO Tun Abdul Razak in Melaka by R.1 effective 22 January 2018 was not interfered with by R.2.

[13] The appellant filed an application for judicial review proceedings (encl 12) under O 53 of the Rules of Court 2012 ('the ROC') to seek the following reliefs:

(a) an order of certiorari to move into the High Court and quash the decision of the first respondent as set out in their memorandum dated

19 January 2018 transferring the applicant to PERKESO Tun Abdul Razak Rehabilitation Centre in Melaka;

(b) an order of certiorari to move into the High Court and quash the decision of the second respondent as set out in their letter and their email both dated 13 December 2019 refusing to transfer the applicant from PERKESO Tun Abdul Razak Rehabilitation Centre in Melaka back to his original place of employment at PERKESO Head Office in Kuala Lumpur;

(c) an order of mandamus to compel the first respondent to transfer the applicant back to the first respondent's Head Office in Kuala Lumpur;

(d) that the costs of the application for leave and the substantive application for judicial review be paid to the applicant; and

(e) such further orders and/or directions as may be given or made as this honourable court deems fit and proper in the circumstances.

[14] The LJ dismissed the appellant's application for judicial review (encl 12). The LJ was of the considered view that the appellant's judicial review application ('JR') is unsustainable as this case is purely a contractual and employment matter and is not suitable for judicial review. Even if the appellant's JR is considered on its merits, the same is bound to fail as the appellant's transfer by R.1 was done in compliance with the terms and conditions of the letter of offer of employment. Therefore, the decision of the first and second respondents is not tainted with any errors of law, irrationality and/or unreasonableness that warrants the intervention of the High Court.

THE APPELLANT'S SUBMISSION

[15] The appellant submits as follows:

> That the second respondent is clearly a public body. It is an integral part of the first respondent, the Social Security Organization (SOCSO). The first respondent being a statutory body performs functions previously carried out directly by the government. SOCSO was established as a statutory body corporate by virtue of s 59A of the Employees Social Security Act 1969 ('Act 4'). Section 59 provides that the Chief Executive Officer of the first respondent is still officially called the 'Director General', a term usually reserved for government departments. Further, by s 95A, the Director General of the first respondent has the power to compound criminal offences. Thus, the second respondent is quite clearly a public body.

[16] The appellant in performing his duties performs a public function. His employment with the respondents is a matter of the performance of duties of a statutory nature. The functions performed by the second respondent are, therefore, similar to the public services commission, and fall under the ambit of a decision, action or omission of a public body exercising a public function.

[17] The appellant is employed by a statutory body, which prior to its incorporation by statute was part of the Ministry of Human Resources. The services performed by the appellant are the services of a public officer exercising public functions, even after the incorporation of the first respondent as a separate statutory body. The High Court fell into error in finding that the appellant was wrong in commencing this action by way of judicial review.

[18] The appellant contends that the transfer decision ('TD') was made ultra vires the respondents' powers and as such, is void for illegality. The High Court premised its determination of the legality of the TD solely on the basis of contractual interpretation of cl 4(iii) of the appellant's letter of appointment. The LJ did not consider at all or adequately the fact that an employee of the first respondent, being in the nature of a public body governed by statute, cannot be made to work for a private corporation, whose objects are not concerned with the public interest. Nor did the LJ consider the authorities cited by the appellant with regard to the conditions underlying the legality of a transfer.

THE RESPONDENTS' SUBMISSION

[19] The respondents submitted that the LJ did not err in law and/or fact in dismissing the appellant's judicial review application. This matter involves the transfer of the appellant pursuant to a letter of offer of employment between the appellant and the first respondent. It is a purely contractual and employment matter in the realm of private law, and an application for judicial review is not the appropriate course of action to be taken by the appellant.

[20] In any event, even if the appellant's judicial review application is considered on its merits, the appellant will nevertheless fail to successfully establish the grounds for judicial review as his transfer was properly carried out by the first respondent in accordance with the terms of the letter of offer of employment.

[21] In view thereof, there is nothing improper, illegal and/or ultra vires about the first respondent's decision to transfer the appellant and the second respondent's decision not to interfere with the first respondent's decision, and the processes which had led to the said outcome. There is also no evidence of breach of natural justice.

OUR DECISION

[22] We will start with the decision of the LJ on the preliminary objection ('PO') raised by the respondents ('R.1' and 'R.2') as to the correct mode of proceedings. The LJ accepted the respondents' objection on this point that the applicant ought to have come to court by way of writ or originating summons,

rather than judicial review, as the second respondent was not a public body and the dispute was strictly a private employment law dispute' rather than a public law dispute. Thus, he upheld the PO. In support of his ruling, the LJ purported to rely on the decision of the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145.

[23] It was the appellant's contention that this ruling was an error of law and plainly wrong on the basis that R.2 was clearly a public body or authority, being an integral part of the structure of the first respondent, which is commonly known as SOCSO.

[24] It was common ground that SOCSO is a statutory body corporate established under s 59A of the Employees Social Security Act 1969 ('Act 4'). By virtue of s 59H of the same Act, all members of R.2 and officers or servants of R.1, including the applicant, are deemed public servants within the meaning of the Penal Code when discharging their duties. Section 59H of the same Act provides that the Public Authority Protection Act 1948, ie an Act relating to the protection of a person acting in the execution of statutory and other public duties applies to R.2.

[25] In law, R.2 is entrusted with the responsibility of dispute resolution between the management and employees of SOCSO by way of arbitration.

[26] Hence, it was amply clear to us that R.1 and R.2 are public bodies performing public functions under statute. As such, the question for our determination was whether the applicant is adversely affected by the 'decision, action or omission' in relation to the 'exercise of the public duty or function'. This is precisely the test that the LJ ought to have invoked in deciding on the determinative question as to the correctness in law of the judicial review ('JR') mode of proceeding pursuant to O 53 r 2(4) of the ROC.

[27] On this threshold point, we are inclined to agree with the appellant that the law only requires that the 'decision, action or omission' of the body sought to be reviewed is in the exercise of a public function. If a decision is based on a statutory power, it must necessarily be amenable to judicial review. We are convinced that our view is consistent with the landmark FC judgment of *Ahmad Jefri bin Mohd Jahri* where it was remarked that:

> So first we have to determine the parameter of matters amenable for judicial review. It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power (see para 61 *Halsbury's Laws of England* (4th Ed, 2001 Reissue) Vol 1(1).

[28] Unlike in *Ahmad Jefri*, the appellant in our case commenced an action against the respondents by JR whereas, in the former, the appellant, a government officer, filed a writ of summons seeking, inter alia, a declaration that his dismissal from government service was null and void. The respondents successfully struck out the appellant's action in the High Court. Both the Court of Appeal ('COA') and the Federal Court upheld the High Court decision on the basis that the appellant's claim was being predominantly a public law claim that can only be pursued by recourse to JR.

[29] In our considered view, the LJ had misdirected himself on the law in regard to the PO when he failed to direct his mind to the relevant question that should be asked in a JR application pursuant to O 53 r 2(4) of the ROC 2012. Had he done so, he would have rightly held that the respondents were public bodies exercising statutory functions in the exercise of which R.1 had made a decision or taken an action with which the applicant, who was also performing public duties under the SOSCO Act was aggrieved. Hence, we would conclude on the PO that the LJ had erred in principle and on the facts in sustaining the respondents' PO and we, accordingly, set aside this decision.

MERITS OF THE APPEAL

Our decision

[30] At the core of the appellant's appeal is that the transfer decision ('TD') was made ultra vires the respondents' powers and in breach of the contract of employment alluded to and as such, is void for illegality.

[31] It is crucial firstly to scrutinise the LJ's reasons for holding that the TD was not illegal which are the following:

(a) the transfer 'was carried out in proper accordance with the terms of the letter of offer of employment dated 20 January 2012', cl 4(iii) which provides that the first respondent has the right to place the appellant in 'any of its offices' ('di mana-mana pejabatnya'); and

(b) as the Melaka Centre is owned by Pusat Rehabilitasi PERKESO Sdn Bhd, which is wholly owned by the first respondent, the Melaka Centre 'is one of the first respondent's offices'.

[32] What figured prominently in the LJ's decision was the appellant's letter of appointment ('LOA'), specifically cl 4(iii).

[33] In essence, the appellant's dissatisfaction arose from the LJ's purported failure to judicially and sufficiently appreciate the fact that an employee of R.1,

being of its nature a public body governed by statute, cannot be directed work for a private corporation outside the structure of SOCSO as a statutory body.

[34] Importantly, it was contended that the LJ had erred in his contractual interpretation of cl 4(iii) of the LOA for these reasons:

(a) first, that R.1 as a public body has no power to transfer the appellant, an employee of a statutory body performing public functions, to a private entity;

(b) second, that from a proper interpretation of cl 4(iii) of the employment contract cannot include the Melaka Centre as an 'office' of the first respondent; and

(c) third, that in any event, the circumstances surrounding the TD renders it illegal or irrational.

[35] We have given due regard to the following points of significance impressed upon us by the appellant. It is trite law that R.1, as a public body and statutory corporation, has only powers conferred directly or indirectly upon it by statute: *Commissioner of the Independent Commission of Investigations v Police Federation and others (Jamaica); Lewin (Director of Complaints of the Independent Commission of Investigations) v Diah (Jamaica)* [2020] UKPC 11 at p 15. As succinctly stated by Buxton LJ in *R v Richmond London BC, ex p Watson* [2001] QB 370 (CA), at p 385C, 'A public body can only do that which it is authorised to do by positive law'.

[36] Applying this settled principle to the instant scenario, nowhere in the governing law is there any provision which empowers R.1 to use its funds, which are by nature public funds, to employ an individual to work for the benefit of a private corporation, even if that corporation is owned by R.1.

[37] A fact that the court should take judicial notice of is that a private entity or corporation is essentially profit-driven whereas a public body would have the public interest as its primary object.

[38] In support of the LJ's decision, the focus and emphasis of the respondents' submission was that a management had the right to transfer its employees at its convenience and that a transfer decision is the prerogative of the management as long recognised in our jurisdiction. Several authorities were cited in support of this proposition.

[39] Briefly, the respondents' position is that the appellant's JR application was unsustainable and a non-starter due to the following failures by the appellant:

(a) failed to adduce any cogent and convincing grounds as to why the first and/or second respondents' decision-making process was flawed;

(b) failed to establish that the first and/or second respondents made an error in law and/or fact and/or had arrived at a decision that relied upon an erroneous factual conclusion and/or arrived at a decision with no evidence to support their conclusion;

(c) failed to demonstrate that the decision of first and/or second respondents was perverse in the sense that no reasonable body similarly circumstanced would have made the same decision; and

(d) failed to show that the first and/or second respondents had not considered all the relevant documentary evidence and had taken into account any irrelevant or extraneous factors.

[40] The hub and thrust of the appellant's case for JR was that the TD was an illegality and/or wrongful because it infringed cl 4(iii) of the appellant's letter of appointment ('LOA') which was the contract of employment between him and SOCSO. It was urged upon us that the LJ had misconstrued the provisions of cl 4(iii) in holding that the Malacca Centre to which the appellant had been transferred was an office of R.1 within the meaning to be ascribed to the word 'office'.

[41] We are prepared to join issue with the LJ to the extent that the decision to transfer the applicant to Pusat Rehabilitasi PERKESO was a management decision by R.1 in relation to the applicant's employment by adopting the principle in *Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors* [2007] 2 MLJ 761; [2007] 1 MLRH 1; [2006] 8 CLJ 114 where it was observed that:

> There is a book written by CP Mills entitled Industrial Disputes Law in Malaysia. At p 75 of the book, the learned author wrote this:
>
> > It is well settled that, normally, the right to transfer an employee from one place to another is the prerogative of the management and an employer is entitled to require his employee to work anywhere.
>
> The decision-making process of the defendants is beyond reproach. Being transferred from Bukit Aman, Kuala Lumpur to Taiping, Perak and from Taiping, Perak to Kota Kinabalu, Sabah is part and parcel of the management prerogative of the defendants. At p 244 of *Alfred Avins Employees Misconduct* (2nd Ed), the following recitals appear:
>
> > The liability to be transferred from one place to another by the employer is an implied condition of service of every employee ... it can only be taken away or curtailed or regulated in express terms ... Therefore, unless the terms of employment provide otherwise, the company has the right to transfer and it is really for the employee to show that there was a contracting out of this position.

A It is the management prerogative of the defendants to transfer the plaintiff anywhere within Malaysia and to any part of Malaysia. The plaintiff has no cause to complain.

B **[42]** However, on the issue of illegality of the transfer we are constrained to reject the LJ's conclusion on the issue at hand as follows:

C The applicant claims that Melaka Centre is a separate legal entity from PERKESO, thus the transfer was illegal. However, I find that the Pusat Rehabilitasi is owned by Pusat Rehabilitasi PERKESO Sdn Bhd which is wholly owned by R.1. The organisation chart of R.1 shows this. Therefore, the Pusat Rehabilitasi is one of the first respondent's offices. Hence, I am of the considered view that the transfer itself was lawful and within the ambit of R.1's powers as the applicant's employer.

D Here the question is not in relation to a challenge on management prerogative but on the legality and correctness of the decision by R.1 and R.2 under the terms of employment and the governing statute.

E **[43]** Having held as above, the LJ, in our view, was misconceived in concluding that there was nothing improper, illegal and/or ultra vires about R.1's decision to transfer the applicant, R.2's decision not to interfere with the same, and the process which had led to the said outcome.

F **[44]** We say so because, to our minds, the LJ had not properly considered the applicant's assertion that while SOSCO which employed him was a public body, being an authority established and governed by law the Melaka Centre was an entity that was legally separate from SOSCO and not established under the SOCSO Act but the Companies Act. We are inclined to agree with the appellant's contention that, under the circumstances, based on a proper G construction of cl 4(iii) of the letter of employment, the transfer was not in accordance with the explicit terms of the said clause that SOCSO is only authorised to transfer its employees, including the applicant to any of its offices. The Melaka Centre cannot by any stretch of language be legally construed as an office of SOSCO, within the meaning of Act 4.

H

I **[45]** As highlighted to us by the appellant, the central question before us was not the conduct of the appellant preceding the TD by R.1 but whether the latter had acted lawfully and properly in accordance with the terms of the contract of employment, in particular the provisions of cl 4(iii) which governed the transfer of R.1's employees to any of its offices. The further question raised as to whether the respondents had acted in bad faith and/or ultra vires did not figure prominently in our deliberation on the core issue of illegality of the transfer from a public body to a private corporation.

[46] It bears reiteration and emphasis that R.1, as a public body and statutory corporation, has only powers conferred directly or indirectly upon it by statute and must function within the confines of those prescribed powers. A

[47] We accept the appellant's proposition as correct that ownership of the private corporation to which he was transferred is immaterial. What is more crucial to note is that the Act does not contain any provision which empowers R.1 to use its funds, which are by nature public funds, to employ an individual to work for the benefit of a private corporation, even if that corporation is owned by R.1. B C

[48] Also, that a private corporation is essentially profit-driven, as opposed to a public body, whose highest object must be the public interest even at its own expense.

[49] It was undisputed that the Melaka Centre, owned by Pusat Rehabilitasi Sdn Bhd, which is in turn owned by R.1, may carry out services which benefit the public and complement R.1's functions, as a company limited by shares and incorporated under the provisions of companies' legislation. However, importantly it remains an essentially commercial enterprise where its primary motive is to maximise profits and returns to its shareholders. D E

[50] We would, therefore, uphold the appellant's contention that for R.1 to transfer him, a public servant who had chosen employment with a statutory body, to continue his service with an institution owned by a private limited company was ultra vires Act 4 and contrary to the terms of cl 4(iii) of the employment contract. From a literal reading of cl 4(iii), it would be crystal clear that R.1 is not empowered by Parliament to transfer the appellant in the manner it did, no provision of contract between the first respondent and the appellant can remedy the illegality of the TD. F G

[51] We are constrained to hold that the LJ had erred in failing to properly construe and interpret the clear terms of the above contract to the detriment of the appellant and arriving at a wrong conclusion that the TD did not suffer from illegality. H

[52] From a plain reading of several provisions of Act 4 which use the term 'office' and which strictly govern and empower the functioning of R.1 in accordance with law, it can be safely and reasonably construed that: I

(a) the term 'office' is confined to offices within the organisational structure of SOSCO as the statutory body established under Act 4; and

(b) such an office must be purely for the sole purpose of the 'efficient functioning' of R.1 only and not for the purpose of maintaining any

other entity. As expressly provided in s 59M of Act 4, R.1 may 'set up within the Organisation such divisions and regional and local offices as it may consider necessary for the efficient functioning of the Organisation'. In the instant context, the Melaka Centre is obviously not an entity 'within' the structure of R.1. It is owned by a private company, which is managed by that company's own Board of Directors independent of SOCSO.

[53] Similarly in s 72(a) of Act 4, which governs the expenditure of R.1, it is stated without qualification that R.1 is authorised to incur expenditure in respect of offices and other services set up for the purposes of giving effect to the provisions of this Act.

[54] To conclude on this point, as the Melaka Centre is neither regulated nor bound by the Act it cannot, therefore, be regarded as an 'office' of R.1 so as to justify the expenditure of funds for the appellant's employment for its benefit. We, would, therefore, hold that if cl 4(iii) of the employment is properly construed and given effect to in accordance with the object and intention of Act 4, R.1 was not authorised to transfer the applicant to a private entity not set up under Act 4 as it was not vested with the power to issue the transfer which is contrary to the interests of R.1 as a public body.

[55] As our considered view is firm and unequivocal that the impugned TD suffers from illegality and contractually wrongful, we do not propose to deliberate on the alleged irrationality of the same or alleged improper motive of R.1 under the surrounding circumstances.

[56] However, in regard to R.2, we have to deliberate on the issue raised by the appellant. In our view, there is substance and basis in the appellant's contention that there was non-direction on the LJ's part when he failed to consider that R.2 had abdicated its decision-making responsibility by shifting it to the management of R.1 through its letter dated 13 December 2019 to decide on the validity of the transfer. Importantly, the LJ had failed to bear in mind that R.2's action was contrary to s 59N(2) of Act 4 since the decision appealed against was made by R.1 itself. R.2 had a statutory obligation and duty to decide the appeal on its merits and not summarily defer to the decision of R.1 without further deliberation.

[57] A perusal of the legislative scheme provided for the establishment of the board ('R.2') would make it abundantly clear that R.2 is indeed a public authority. Hence, the respondents' proposition that R.2's decision or action is not amenable to JR for not being a public authority or body is obviously baseless and flawed.

[58] For convenience, we reproduce s 59B(1)–(3) of Act 4 which state that:

> 59B Establishment of the Board
>
> (1) There shall be established a board to be known as the Social Security Organization Board.
>
> (2) The Board shall be composed as follows:
>
> (a) a Chairman to be appointed by the Minister;
>
> (b) the Director General of the Organization;
>
> (c) an officer representing the Ministry of Finance;
>
> (ca) as officer representing the Ministry responsible for human resources;
>
> (cb) an officer representing the Ministry responsible for health;
>
> (d) not more than four persons representing employers to be appointed by the Minister in consultation with such Organizations representing employers as the Minister may think fit for that purpose;
>
> (e) not more than four persons representing insured persons to be appointed by the Minister in consultation with such Organizations representing insured person as the Minister may think fit for that purpose;
>
> (f) three persons with experience in social security matters to be appointed by the Minister.
>
> (3) The appointment of members of the Board shall be notified in the *Gazette*.

[59] This was a typical instance of R.2 having failed to apply its mind to the appeal lodged by the appellant and instead, sought to delegate the decision-making duty to R.1 even though it was plainly a non-delegable duty under Act 4 (s 59J of Act 4).

(See *Lembaga Jurutera Malaysia v Leong Pui Kun* [2009] 2 MLJ 36, (FC)).

CONCLUSION

[60] For the foregoing reasons, in our judgment, there are substantial merits in law and fact in the appellant's appeal against the LJ's decision in respect of both respondents that warrant appellate intervention. Principally, as adverted to, the impugned decision, in our view, is tainted with illegality and contrary to the contract of employment.

[61] We would conclude that the LJ had with respect, erred in principle and on the instant facts in dismissing the JR application based on these grounds:

(a) as regards the PO that the matter involves the transfer of the appellant pursuant to a letter of offer of employment between the appellant and

R.1. It is a purely contractual and employment matter in the realm of private law, and an application for judicial review is not the appropriate course of action to be taken by the appellant; and

(b) in any event, even if the appellant's JR application is considered on its merits, the appellant will nevertheless fail to successfully establish the grounds for judicial review as his transfer was properly carried out by R.1 in accordance with the terms of the letter of offer of employment.

[62] We, accordingly, allow this appeal with costs and set aside the decision of the High Court. In the result, the reliefs sought by the appellant ought to be granted. We, therefore, grant an order in terms of prayers (a), (b) and (c) of the JR application.

Appeal allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh